# Bukit Kiara Resort Bhd v Dato Bandar Kuala Lumpur

HIGH COURT (KUALA LUMPUR) — CIVIL SUIT NO S-21NCVC-52 OF 2011
AMELIA TEE ABDULLAH J
21 SEPTEMBER 2011

*Land Law — Lease — Agreement for a lease — Plaintiff occupied land leased from defendant — Additional land required for expansion of resort's activities — Defendant applied for alienation of adjoining land for plaintiff's use — Plaintiff paid substantial premium for alienation of land — Substantial development carried out on land — Parties negotiated for lease but formalised nothing — Whether there was oral agreement to grant lease of land to plaintiff — Conduct of parties — Whether other facts evidenced agreement to grant lease*

The plaintiff leased land ('the first lot') for 70 years from the defendant to develop and operate the Bukit Kiara Club. When alienating the first lot, the Land Authority had restricted its usage to equestrian and recreational activities only. Realising the need for additional land for the development of a polo field and grandstand, the plaintiff agreed with the defendant that the latter would apply for the land adjoining the first lot ('Lot 52314') for that purpose. The land office approved the defendant's application for Lot 52314 'as additional land to the first lot' and restricted its usage to equestrian, recreational and polo activities. A premium of RM4,221,154.99 chargeable on the alienated land was billed to the defendant but paid by the plaintiff. The plaintiff then set about developing Lot 52314 with an equestrian centre, polo field, grandstand, stables, horse track/trail, horse riding school, and indoor tennis and basketball courts, all of which cost an estimated RM22.5m. The plaintiff and defendant held several discussions and exchanged draft agreements for the lease of Lot 52314 but no agreement was formalised. Problems arose when the defendant informed the plaintiff that it intended to surrender Lot 52314 to the Federal Government for the development of a large scale public park and issued a notice to the plaintiff to quit and deliver up vacant possession of the property within 90 days. The plaintiff objected, saying there was a concluded oral agreement between the parties for the plaintiff to have a 70 year lease of Lot 52314. The defendant denied there was any such agreement as the parties had merely had negotiations for a lease and nothing had been formalised. The plaintiff filed the instant action for various reliefs, but ultimately prayed for only specific performance of one of the incomplete draft lease agreements that had been exchanged between the parties.

**Held**, granting the claim with costs and ordering the parties to enter into a formal and written lease agreement for Lot 52314:

(1) The actions of both parties prior to and after the alienation of Lot 52314 were consistent with there being an oral agreement or understanding between them that the subject Lot was to be leased to the plaintiff as additional land for the running of the resort (see para 65).

(2) There was an oral agreement for a lease or else the defendant would not have required the plaintiff to pay the premium, quit rent and other dues and charges, allowed the plaintiff to be in occupation or approved its plans to develop a polo field, grandstand, stables and other amenities on the said Lot. Neither would the plaintiff have agreed to pay the premium on the property (see para 72).

(3) The defendant had allowed the plaintiff to act on the purported oral lease by expending considerable sums of monies to develop the property (see para 72).

(4) In its pleadings the defendant had admitted to the plaintiff being a lessee. This was binding on the defendant and amounted to a judicial admission that the plaintiff was a lessee and could be made the foundation of rights (see paras 66–67).

(5) The existence of an oral agreement to lease the subject land was also consistent with the minutes of the meeting held on 26 August 2008 at the Federal Territory Ministry which noted that the defendant had approved the lease for Lot 52314 to the plaintiff for 70 years from 1993 although no lease agreement had been signed. The minutes were received by the defendant but no attempt to correct them was made if they were inaccurate (see para 68).

(6) The defendant's notice to quit and deliver up vacant possession of Lot 52314 was improper, unfair, unjust and premature (see para 71).

**[Bahasa Malaysia summary**

Plaintif telah memajakkan tanah ('lot pertama') selama 70 tahun daripada defendan untuk membangunkan dan mengendalikan Kelab Bukit Kiara. Apabila memberi hak milik tanah lot pertama, pihak berkuasa tanah telah menghadkan penggunaannya kepada aktiviti-aktiviti ekuestrian dan rekreasi sahaja. Menyedari keperluan untuk tanah tambahan demi pembangunan sebuah padang polo dan *grandstand*, plaintif bersetuju dengan defendan bahawa mereka akan memohon tanah yang bersempadan dengan lot pertama ('Lot 52314') bagi tujuan tersebut. Pejabat tanah telah meluluskan permohonan defendan ke atas Lot 52314 *as additional land to the first lot* dan menghadkan penggunaannya kepada aktiviti-aktiviti ekuestrian, rekreasi dan polo. Premium boleh cukai sebanyak RM4,221,154.99 ke atas tanah beri milik tersebut telah dibilkan kepada defendan tetapi telah dibayar oleh plaintif.

Plaintif, dengan itu, berusaha membangunkan Lot 52314 dengan pusat ekuestrian, padang polo, *grandstand*, kandang kuda, trail/trek kuda, sekolah menunggang kuda dan gelanggang tennis dan bola keranjang tertutup dan bola keranjang, yang mana kesemuanya menelan anggaran belanja sebanyak RM22.5juta. Plaintif dan defendan telah mengadakan beberapa perbincangan dan bertukar draf perjanjian bagi pajakan Lot 52314 tetapi tiada perjanjian telah dimeterai. Masalah timbul apabila defendan memaklumkan plaintif bahawa dia sebenarnya bercadang untuk menyerahkan Lot 52314 kepada Kerajaan Persekutuan bagi pembangunan taman awam besar-besaran dan mengeluarkan notis kepada plaintif untuk berhenti dan menyerahkan milikan kosong hartanah berkenaan dalam tempoh 90 hari. Plaintif membantah, menghujahkan bahawa terdapat perjanjian lisan muktamad antara pihak-pihak untuk plaintif mempunyai pajakan selama 70 tahun bagi Lot 52314. Defendan menafikan terdapatnya perjanjian tersebut kerana pihak-pihak hanya mengadakan rundingan berkenaan pajakan dan tiada apa-apa yang telah diformalkan. Plaintif telah memfailkan tindakan ini untuk pelbagai relief, tetapi khususnya memohon pelaksanaan spesifik salah satu daripada draf perjanjian pajakan yang tidak lengkap yang telah ditukar antara pihak-pihak tertentu.

**Diputuskan**, membenarkan tuntutan dengan kos dan mengarahkan pihak-pihak untuk memasuki perjanjian pajakan yang formal dan bertulis bagi Lot 52314:

(1) Tindakan kedua-dua pihak sebelum dan selepas pindah milik atas Lot 52314 adalah selaras dengan terdapatnya perjanjian lisan atau persefahaman antara mereka bahawa lot yang terlibat dipajakkan kepada plaintif sebagai tanah tambahan bagi pengendalian *resort* (lihat perenggan 65).

(2) Terdapat perjanjian lisan untuk pajakan, jika tidak, defendan tidak akan memerlukan plaintif untuk membayar premium, cukai tanah dan hutang yang perlu dibayar dan caj-caj lain, membenarkan plaintif berada dalam pekerjaan atau meluluskan rancangan untuk membangunkan padang polo, *grandstand*, kandang dan kemudahan-kemudahan lain di atas lot tersebut. Plaintif juga tentu tidak akan bersetuju untuk membayar premium ke atas harta tersebut (lihat perenggan 72).

(3) Defendan telah membenarkan plaintif untuk bertindak atas apa yang didakwa sebagai pajakan lisan dengan membelanjakan sejumlah besar wang untuk membangunkan hartanah tersebut (lihat perenggan 72).

(4) Dalam plidingnya, defendan telah mengakui plaintif sebagai penyewa. Ini adalah mengikat ke atas defendan dan terjumlah kepada pengakuan kehakiman bahawa plaintif adalah penyewa dan boleh dijadikan asas kepada hak-hak (lihat perenggan 66–67).

(5) Kewujudan perjanjian lisan untuk memajak tanah terbabit adalah juga selaras dengan minit-minit mesyuarat yang diadakan pada 26 Ogos 2008 di Kementerian Wilayah Persekutuan yang menyatakan bahawa defendan telah meluluskan pajakan untuk Lot 52314 kepada plaintif selama 70 tahun dari tahun 1993 walaupun tiada perjanjian pajakan telah ditandatangani. Minit-minit telah diterima oleh defendan tetapi tiada percubaan untuk memperbetulkannya sekiranya ia tidak tepat (lihat perenggan 68).

(6) Notis defendan untuk berhenti dan menyerahkan pemilikan kosong Lot 52314 adalah tidak wajar, tidak adil, dan pra-matang (lihat perenggan 71).]

**Notes**

For cases on agreement for a lease, see 8(1)(2) *Mallal's Digest* (4th Ed, 2010 Reissue) paras 3541–3546.

**Cases referred to**

*David Wong Hon Leong v Noorazman bin Adnan* [1995] 3 MLJ 283; [1995] 4 CLJ 155, CA (folld)

*Hu Chang Pee v Tan Sri Datuk Paduka (Dr) Ting Pek Khiing* [1999] 3 MLJ 402, HC (refd)

*S Kulaisingam & Anor v Commissioner of Lands, Federal Territory & Ors* [1982] 1 MLJ 204, FC (refd)

*Sinar Wang Sdn Bhd v Ng Kee Seng* [2005] 2 MLJ 42, CA (refd)

*Salleh bin Kilong, deceased) v Superintendent of Lands and Surveys, Miri Division & Anor* [2005] 3 MLJ 305, CA (refd)

*Yew Wan Leong v Lai Kok Chye* [1990] 2 MLJ 152, SC (refd)

**Legislation referred to**

Federal Constitution art 13
Land Acquisition Act 1960
National Land Code 1965 ss 81, 82

*K Kirubakaran (Kiru & Yong) for the plaintiff.*
*Yusfarizal bin Yussoff (Mohammad Zaid bin Daud with him) (Zulpadli & Edham) for the defendant.*

**Amelia Tee Abdullah J:**

**[1]** Bukit Kiara Resort Bhd, the plaintiff, claims against the defendant, Dato Bandar Kuala Lumpur, various declaratory and mandatory orders in relation to Lot No 52314 held under PN 26127 ('Lot No 52314'). The plaintiffs claims are hotly disputed by the defendant who contends that it had not executed any agreement with the plaintiff in respect of Lot No 52314. In the alternative, the

defendant avers that if the court were to hold that there was an oral agreement for a 70 year lease, the oral agreement had been frustrated based on the Government's decision that Lot No 52314 is to be made part of the 'Taman Awam Berskala Besar' ('The TABB project').

THE PLAINTIFF'S CASE

**[2]** The plaintiffs Club Manager, Tengku Intan Masuri bt Tengku Jaafar Laksamana ('PW1'), testified as regards the plaintiffs various changes of names. The plaintiff, which was initially known as Sports Toto Riding & Recreation Sdn Bhd, had on 13 July 1990 changed its name to Bukit Kiara Equestrian & Country Resort Sdn Bhd. On or about 11 November 1992, it changed its name to Bukit Kiara Equestrian & Country Resort Bhd and then on or about 6 November 1993, it once again changed its name to Bukit Kiara Resort Bhd. The plaintiffs primary object, as borne out by its memorandum and articles of association, is to develop and manage the Bukit Kiara Club. It has approximately 5,736 members.

**[3]** PW1 joined the plaintiff in June 2006 as operations manager and became the club manager with effect from May 2007. She agreed that she was not the person who dealt with the defendant or the land authorities in respect of Lot No 52314. She further agreed that she was not the proper person to testify in court about the land dealings between the parties. However, she disagreed that she would have no first hand information on the dealings between the parties, maintaining instead that she did have first hand information in respect of some of the meetings that took place.

LOT NO 50642

**[4]** The plaintiff had entered into an agreement dated 25 March 1989 ('the 1989 agreement') with the defendant to lease Lot No 50642 measuring approximately 69.845 acres for a term of 70 years for the purpose of developing and operating the Bukit Kiara Club. In due course, the land authority alienated Lot No 50642 to the defendant and the issue document of title was issued on 27 March 1998. The document of title states that the land was to be used for equestrian and recreational purposes only and any development thereon was to be in accordance with the defendant's development order. Although the defendant had not caused the lease for Lot No 50642 to be executed and registered in the name of the plaintiff, it had also not disturbed or interrupted the plaintiffs quiet enjoyment of the land.

**[5]** PW1 agreed that when the 1989 agreement was signed, the application for alienation for Lot No 52314 had not yet been applied for by the defendant. As such, she agreed that it was impossible in the circumstances to include Lot

No 52314 in the 1989 agreement.

LOT NO 52314

**[6]** In respect of Lot No 52314, the plaintiff, realising that it needed additional land, held negotiations with the defendant for additional land for the development of a polo field and a grandstand. The plaintiff reached an agreement with the defendant whereby the defendant would apply for additional land adjoining Lot No 50642 to complement its development on Lot No 50642. The land office in Wilayah Persekutuan vide its letter dated 6 December 1993 approved the defendant's application for 62.57 acres of state land as additional land to Lot No 50642. The court notes that the caption to the land office's letter dated 6 December 1993 reads as follows:

> Permohonan Tanah Kerajaan Bagi Tujuan Tambahan Kepada Tapak Pembangunan Pusat Menunggang Kuda dan Rekreasi dan Untuk Tujuan Gelanggang Polo Daripada Dewan Bandaraya Kuala Lumpur.

According to PW1, the 'syarat-syarat nyata' in the letter of approval states that:

(i) Tanah ini hendaklah digunakan untuk tapak Pusat Menunggang Kuda dan Rekreasi dan untuk tujuan Gelanggang Polo sahaja.

(ii) Pembangunan di atas tanah ini hendaklah mematuhi Perintah Pembangunan yang dikeluarkan oleh Datuk Bandar Kuala Lumpur.

**[7]** The land office issued Form 5A 'Notis Genap Masa Hasil Tanah DiBayar' pursuant to ss 81 and 82 of the National Land Code 1965 requiring the defendant to pay a sum of RM4,221,154.99 being premium for the land, the first year's quit rent, survey fees, boundary markings and fees for the preparation of the title. The defendant in turn requested the plaintiff to pay the RM4,221,154.99, which it did. The payment was acknowledged receipt vide the defendant's official receipt No 744810 dated 1 March 1994. The issue document of title for Lot No 52314 was issued by the land office to the defendant on 14 October 1994. In cross-examination, PW1 agreed that nowhere in the defendant's letter or the receipt was it stated that in consideration of the premium paid, the defendant would lease the land to the plaintiff for 70 years.

**[8]** The plaintiff proposed the following development plans for Lot No 50642 and No 52314 to the defendant:

(a) *on Lot No 50642*

(i) Parcel A which would consist of the club house, sports complex and stables;

(ii) Parcel B which would house the indoor basketball and indoor tennis court;

(iii) Parcel C which would house the indoor arena; and

(iv) Parcel D measuring about 22 acres which is temporarily left as empty land.

(b) *on Lot No 52314*

(i) Part of Parcel B sits on Lot No 52314;

(ii) Parcel E (about 43 acres) was earmarked for the polo field and grandstand; and

(iii) Parcel D (about 20 acres) as empty land.

**[9]** The plaintiff developed part of Lot Nos 50642 and 52314 and commenced operations with the following facilities:

(a) *on Lot No 50642*

(i) a fully equipped sports complex;

(ii) a 12 lane bowling alley;

(iii) club house with a coffee house & Chinese restaurant;

(iv) indoor arena; and

(v) paddock (main yard, annex, riding school & half of sand paddock).

(b) *on Lot No 52314*

(i) Equestrian Centre (Polo field and stables);

(ii) Polo grandstand;

(iii) horse track/trail; and

(iv) horse riding school.

She gives the total development costs incurred by the plaintiffs as at October 2009 as RM22,452,446.03. Other expenses incurred as at 2005 for Lot No 52314 is given as RM4,939,193.99. A detailed breakdown of the total development costs is not in the common bundle and hence not before the court.

**[10]** From time to time, the defendant issued certificates for occupation for the various developments carried out on Lot Nos 50642 and 52314. PW1 agreed that the certificate for occupation is a document to certify that a building is safe to be occupied. Thus it was suggested to the witness that the certificates for occupation is not tantamount to an acknowledgement by the defendant of any lease to the plaintiff.

**[11]** A close look at the chart or plan for both Lot Nos 59642 and 52314 will reveal that whilst Parcels A and C sit on Lot No 50642, Parcels B, D and E sit on both Lots 50642 as well as 52314. It can be seen that a substantial portion of Parcel E is on Lot No 52314.

**[12]** Between the years 1997 and 2010, the plaintiff had paid:

(a) quit rent to the land office in the sum of RM1,768,593 for Lot No 50642 and RM313,891 for Lot No 52314. All the receipts have been issued by the land office to the 'Datuk Bandar Kuala Lumpur d/a Bukit Kiara Resort Berhad';

(b) RM291,000pa as lease rentals for Parcels A, B & C for Lot No 50642. Total amount paid until March 2010 is RM5,564,255;

(c) rental for Lot No 52314;

(d) premium of RM4,221,154.99 for Lot No 52314; and

(e) an aggregate sum of RM1,311,648 for the assessments on the structures upon which the Bukit Kiara Club sits.

It is PW1's evidence that the total development cost incurred by the plaintiff in respect of the development of Lot No 52314 was RM22,452,446.02 (for the polo field and grandstand, indoor tennis courts, indoor basketball court and 30 units of stables).

**[13]** PW1 was asked about the membership fees and other fees and charges of the club. Individual membership is selling at RM10,000 and corporate membership at RM15,000. There is also term membership at RM5,500 per year. Members would also pay a monthly subscription fee of RM110.75. In exchange for this, they would get to use all the facilities of the club although they would have to pay for the use of the indoor basketball, indoor badminton, and indoor tennis courts, for lessons and for playing polo. The use of the club's facilities such as the ballrooms, halls, courts, and bowling alleys by outsiders would also incur charges. Charges for a seminar is about RM50 per pax and the amount charged for the use of a field for a concert is about RM10,000 per day.

**[14]** In respect of Lot No 52314, the plaintiff and the defendant had a series of discussions and exchange of draft lease agreements but to date, no agreement has been signed between them. PW1 offered the explanation that there was no agreement because until today, both parties are still in discussions in respect of the lease agreement.

**[15]** Although PW1 had stated in answer 10A of her witness statement that on or around 27 July 1995, the plaintiff had received a draft agreement for Lot No 52314 from the defendant, however during cross-examination, she

conceded that the draft agreement was actually prepared by the legal department of the plaintiff. She further agreed that there is nothing in the letter of 27 July 1995 which suggests that the defendant had sent to or returned to the plaintiff any draft agreement. *The court notes that the draft agreement in is an incomplete document and neither party was able or willing to produce the complete agreement.* This incomplete draft agreement refers to the 'said land' as having an acreage of 69.845 acres. PW1 agreed that this is the acreage of Lot No 50642 and that the acreage of Lot No 52314 is actually 62.57 acres. The court notes that an alternative relief prayed for by the plaintiff is for the specific performance of the incomplete draft agreement. However, the plaintiff in its submissions had indicated that they were no longer asking for this alternative relief.

**[16]** The court notes that pp 133–163 would appear to be Draft 5 of the privatisation agreement between the parties inclusive of Schedules. Pages 164–196 would appear to be Draft 4. Both drafts were drafted by the plaintiffs senior manager in group legal. Unfortunately, PW1 was unable to say if there were any more drafts after Draft 5 although she did say that to her knowledge, Draft 5 was the last draft. She was unable to say who had made the very many scribbles/amendments/comments on Draft 5. When questioned about specific provisions of the said draft, PW1 agreed that according to Draft 5, the term of the lease was 65 years. She agreed that cl 6.8 on bumiputra participation is an important clause. Although the clause states that the lessee shall offer at least 30% of its contracts for works under the project to bumiputra construction companies, there is a handwritten note above it which states '50%'. She confessed that she did not know why the words '50%' were written or the understanding of the parties as regards bumiputra participation. The witness was also referred to the handwriting at the top of p 133 which reads: 'to include Table of Contents * EIA Report, Environmental matters.' Again, she confessed not to have any knowledge of the requirement to submit the EIA report. The court finds that evidence adduced as regards the draft agreements to be less than inspiring.

**[17]** Problems arose when the defendant indicated to the plaintiff its intention to surrender Lot No 52314 to the Federal Government for the proposed development of the 'Taman Awam Berskala Besar' ('the TABB project'). At a meeting held on 10 April 2008 chaired by the Timbalan Ketua Pengarah Tanah dan Galian Persekutuan (P) to discuss the TABB project, the representative from the defendant had informed that there were various infrastructures developed by the plaintiff on Lot No 52314. The meeting was informed that:

> … *lot 50642 telah dipajak oleh syarikat* Bukit Kiara Resort *selama 70 tahun dan pihak syarikat telah mendirikan pelbagal infrastruktur rekreasi dan kelab di atas lot tersebut Lot tersebut juga berada bersebelahan dengan lot 52314. Mesyuarat mengambil*

*maklum bahawa perjanjian penyewaan untuk lot 52314 belum ditandatangani tetapi premium dan cukai telah dibayar sejak tahun 2005 oleh syarikat* Bukit Kiara Resort Berhad. (Emphasis added.)

**[18]** PW1 agreed that the meeting was informed about the 'perjanjian penyewaan' not having been signed. There was no mention of any lease agreement or privatisation agreement. During cross-examination, PW1 was also referred to a number of letters sent by the defendant as follows:

(a) the defendant's letter dated 28 November 2007 (p 1 of CB 3) which was sent before the meeting of 10 April 2008. She agreed that in this letter, there was also nothing about a *perjanjian pajakan* or privatisation agreement. The plaintiff was being asked to quickly forward a draft of the *perjanjian penyewaan* for the Polo Field (Parcel E);

(b) the defendant's letter dated 24 January 2008 (p 2 of CB 3) where the plaintiff was reminded that they had yet to receive the draft of the *perjanjian penyewaan* for the Polo Field (Parcel E); and

(c) the defendant's letter dated 16 April 2008 (p 3 of CB 3) referring to their letter of 24 January 2008 and the meeting of 17 March 2008 and again asking the plaintiff to forward the draft of the *perjanjian penyewaan* for the Polo Field (Parcel E) urgently for their further action.

**[19]** PW1 did not agree that the reason why the plaintiff had not responded to the defendant's various reminders to forward the draft *perjanjian penyewaan* was because they were not interested in proceeding with the said *perjanjian*. Her explanation for not forwarding the draft *perjanjian* was because the parties were still in negotiations. In principle, the plaintiff had agreed to the *perjanjian penyewaan* but the parties were still finalising the terms. She also agreed that there was no issue of any separate tenancy agreement for Parcels A, B and C.

**[20]** Reference was made to another meeting held on 26 August 2008 at the Kementerian Wilayah Persekutuan chaired by the Timbalan Ketua Setiausaha (Pembangunan). PW1 confirmed that representatives of both the plaintiff and the defendant attended the meeting. The minutes of the meeting reveals the following:

2.1.3 Pihak DBKL telah *meluluskan sewa pajakan Lot 52314 kepada BKRB selama 70 tahun* bermula pada tahun 1993. Walau bagaimanapun, sehingga kini tiada perjanjian sewa pajakan pernah ditandatangani oleh kedua-dua pihak.

2.1.7 Pihak BKRB bersetuju bahawa Lot 52314 adalah milik DBKL dan berhasrat untuk meneruskan projek penswastaan di atas lot berkenaan seperti yang dipersetujui pada tahun 1993. Namun begitu, perjanjian penswastaan masih belum boleh ditandatangani memandangkan jenis pembangunan yang akan dilaksanakan di atas lot berkenaan masih belum dimuktamadkan.

However, there was no mention in the minutes that requests were made for the draft *perjanjian penyewaan* for Parcel E. The minutes of the meeting of 26 August 2008 were circulated not only to the plaintiff but also to the defendant.

**[21]** Reference was also made to another meeting on 6 January 2010 held at the Kementerian Wilayah Persekutuan dan Kesejahteran Bandar (KWPKB) where the issue of Lot No 52314 was discussed. The meeting took note of the statement of the Timbalan Ketua Setiausaha KWPKB 'bahawa Kerajaan masih mengekalkan keputusan untuk tidak membenarkan sebarang pembangunan di sebahagian Lot 52314 dan Lot 50642 berdasarkan keadaan bentuk muka bumi serta persekitaran semulajadinya'. The meeting further took note that steps were being taken to remove the caveat that had been entered by the plaintiff over Lot No 52314 and that if no final resolution was reached with the plaintiff on the matter; the Government would institute court proceedings to cancel the caveat. As at 6 January 2010, the door was not shut as there was to be another meeting between Tan Sri Vincent Tan, the director of the plaintiff and YB Dato' Haji Ahmad Faisal scheduled for 14 January 2011.

**[22]** In the final analysis, what the Government wanted was to take the whole of Lot No 52314 for the purposes of the TABB project but the plaintiff was only willing to surrender 12.58 acres out of 62.62 acres.

**[23]** According to PW1, the acts of the defendant were inconsistent with its allegations that the plaintiff had no rights over Lot No 52314 since 2008. Firstly, the defendant had continued to rely on the plaintiff to defend the title to Lot No 52314 by requesting and allowing the plaintiff to pay the quit rent for the said lot. Secondly, the defendant had been collecting rental for the land used by the plaintiff for the polo field and stables. Thirdly, the defendant vide its letter dated 22 March 2010 had stated, inter alia, that the plaintiff was still required to pay a monthly rental of RM2000 for Parcel E.

**[24]** During cross-examination, the witness was questioned as to the profits that were derived by the plaintiff from Lot No 52314. According to PW1, no profits were generated at all. It is her evidence that although the polo field was on the said lot, however the plaintiff did not make any profits from the subject lot as they had to pay maintenance and salaries.

**[25]** As such, the plaintiff prays for:

(a) a declaration that the plaintiff has a concluded contract for lease/privatisation cum lease of Lot No 52314 for a term of at least 70 years;

(b) in the alternative, an order directing the defendant to execute a lease of

Lot No 52314 in favour of the plaintiff upon the terms and conditions of the fourth draft agreement exchanged between the parties; and

(c) in the alternative, an order directing the defendant to execute the lease/privatisation agreement as per the draft lease/privatisation agreement forwarded vide the defendant's letter dated 27 July 1995.

**[26]** PW1 disputed the defendant's averment that the plaintiff had acquired no interest over Lot No 52314 or that it had not accepted rental since the cabinet decision to make Lot No 52314 a part of the TABB project. She maintained that the plaintiff had acquired a legal interest over Lot No 52314 as a beneficiary having paid premium on behalf of the defendant as well as quit rents until the present. Furthermore, the defendant had been collecting rental for Parcel E which houses the polo field on Lot No 52314 as late as April 2010 notwithstanding that the issue of the TABB project had surfaced in June 2007.

**[27]** The plaintiffs second witness is Norashikin bt Abdul Manan ('PW2'), a corporate executive of the plaintiff. In relation to the three letters at pp 1–3 of CB 3, PW2 explained that the plaintiff did not respond to these letters because it had always maintained that the defendant had agreed to a 70 year lease for Lot No 52314 and that the additional rental for the developed portion of Lot No 52314 (Parcel E) had been agreed upon from the moment that Parcel E was developed. Initially, the rent was RM5,000 per month but this was subsequently reduced to RM2,000 per month after the temporary certificate of fitness was issued. PW2 also pointed out that in respect of Lot No 50642 where Parcels A, B and C were developed, there were no separate tenancy agreements entered into between the parties.

**[28]** PW2 confirmed that the minutes of the meeting held on 26 August 2008 which she attended were circulated because she had received it on behalf of Dato' Azlan Meah.

**[29]** Muhamad Ridzuan bin Hanan ('PW3') is a *pegawai tadbir diplomatik* with the Pejabat Pengarah Tanah dan Galian, Wilayah Persekutuan. PW3 was referred to a letter dated 6 December 1993 issued by Jabatan Tanah dan Galian to the defendant, the subject matter of which was 'Permohonan Tanah Kerajaan Bagi Tujuan Tambahan Kepada Tapak Pembangunan Pusat Menunggang Kuda dan Rekreasi dan Untuk Tujuan Gelanggang Polo Daripada Dewan Bandaraya Kuala Lumpur'. When the application was made, Jabatan Tanah dan Galian had prepared a *laporan tanah*. The land applied for — Lot No 52314 — adjoins Lot No 50642 and was applied for as an addition to Lot No 50642. The *syarat-syarat nyata* appearing on the issue document of title states, inter alia, that it was to be used as the site for the 'tapak Pusat Menunggang Kuda dan Rekreasi dan untuk tujuan Gelanggang Polo sahaja'.

There was no condition that the defendant was to develop the land with any other party or that the registered owner was obliged to lease it to the plaintiff.

**[30]** PW3 told the court that he had knowledge as to the decision of the Government to acquire Lot No 52314 to be developed into a large scale public park or TABB. As regards the current status of the project, he testified that the gazette was put on hold for the moment because the defendant had yet to surrender the land back to the Government. During re-examination, he agreed that until today there was no action by the Government to compulsorily acquire the land under the Land Acquisition Act 1960.

THE DEFENDANT'S CASE

**[31]** Kamarulzaman bin Mat Salleh ('DW1') is the defendant's Deputy Director at Jabatan Penilaian dan Pengurusan Harta and had held that position since 1 November 2010. Before that he was *pegawai penilai* at the same department since 2 January 1991.

**[32]** DW1 professed to have knowledge as to the agreement in respect of Lot No 50642 which was leased to the plaintiff under a 70 year lease commencing from 25 March 1989. Clause 7.01 of the lease agreement sets out that the plaintiffs right is a purely contractual right to occupy the said land as lessee and to operate and manage the riding and recreational centre upon the completion of the project. There were no separate agreements in respect of Parcels A, B and C because the defendant was relying on the 1989 agreement.

**[33]** In respect of Lot No 52314 which adjoins Lot No 50642, the lot belongs to the defendant and was not included in the lease agreement for Lot No 50642. DW1 did not dispute that following discussions between the plaintiff and the defendant, the defendant had applied for the alienation of Lot No 52314. He further agreed that it was one of the *syarat-syarat ternyata* that the land 'tidak boleh dipindahmilik, dipajak, dicagar atau digadai tanpa kebenaran Jawatankuasa Kerja Tanah Wilayah Persekutuan Kuala Lumpur'. According to DW1, the defendant had only permitted the plaintiff the use of Lot No 52314 as a tenant or a licensee. The issue document of title was issued by the land office to the defendant on 14 October 1994. DW1 agreed that premium, tax and other expenses amounting to RM4,221,154.59 were paid by the plaintiff.

**[34]** DW1 was referred to para 2.1.3 of the minutes of the meeting on 26 August 2008 which states that DBKL had approved a 70 year lease to the plaintiff commencing in 1993. He disagreed with the suggestion that there existed a lease agreement between the parties. He clarified that it is not the defendant's case that the plaintiff had no rights at all over the subject lot but

that the plaintiff had been given permission to occupy the land with monthly payments of RM2,000 per month from 1993 to October 2010. A

**[35]** The dispute relating to Lot No 52314 arose when the Cabinet made a decision on 27 June 2007 that Lot No 52314 was to be turned into a part of the TABB project to be managed by Jabatan Landskap Negara under the Ministry of Housing and Local Government. At its meeting on 29 December 2009, the Jawatankuasa Kerja Tanah Wilayah Persekutuan agreed to approve the surrender of Lot No 52314 back to the Government. This was informed by the Kementerian Wilayah Persekutuan to the defendant vide its letter dated 12 February 2010. B C

**[36]** However, the surrender of Lot No 52314 back to the Government encountered a snag when it was discovered that the plaintiff had entered a private caveat over the said lot. A search at the land office reveals that a private caveat was entered by the plaintiff on 22 April 2008. The defendant complains that: D

(a) the plaintiff had made incorrect or erroneous representations;

(b) the plaintiff had waited 15 years from the date of entry into the land in 1993 before lodging the caveat and 18 years before filing the present action; E

and that this shows that the plaintiff did not have a caveatable interest in respect of Lot No 52314.

F

**[37]** DW1 denied that until 2007, there was no issue between the parties pertaining to the subject lot. He had attended various meetings where there were discussions on problems relating to the tenancy and privatisation agreements.

G

**[38]** In respect of Parcel E, DW1 was referred to the minutes of meeting held on 10 May 2001 where the defendant had reduced the 'kadar sewa' for Parcel E from RM60,000 per year or RM5,000 per month to RM24,000 per year or RM2,000 per month out of goodwill. The plaintiff paid from 2005 after the issue of the CF until October 2010. According to DW1, since the plaintiff was operating a Polo Club on Lot No 52314 which was a lucrative business, it was unreasonable for the plaintiff to claim that the rights to the said lot should be given to it merely for a monthly rental of RM2,000. According to DW1, based on his professional opinion, a reasonable rental for Lot No 52314 should be RM5,000 per month and this would be raised by 10% every three years. H I

**[39]** According to DW1, the plaintiff as a tenant or licensee does not enjoy exclusive rights over the property and any development of the land would require the approval of the defendant. Following negotiations between the

parties, the plaintiff was allowed to utilise the additional land for the suggested development, but only for rental purposes. Whilst permission was given for the payment of a nominal rental, DW1 maintained that there was no agreement, whether oral or written, in respect of the lease of Lot No 562314.

**[40]** In respect of the Government's plans for the TABB project, the minutes of the meeting held on 10 April 2008, which was attended by DW1, would reveal that the meeting was informed about the TABB project which would affect Lot No 52314 involving 62.569 acres of the defendant's land. The meeting took note that Lot No 50642 had been leased to the plaintiff for 70 years and that recreational infrastructure and a clubhouse had been constructed on the lot. The subject lot, Lot No 52314 adjoins Lot No 50642. The meeting further took note that a 'Perjanjian Penyewaan' for Lot No 52314 had yet to be signed although premium and tax had been paid by the plaintiff since 2005.

**[41]** Following and in line with the Cabinet decision on the TABB project, the defendant had issued to the plaintiff a 'Notis Untuk Menyerahkan Pemilikan Kosong Hartanah Milik Datuk Bandar Kuala Lumpur dated 25.2.2011'. The plaintiff was required to deliver vacant possession within 90 days from 25 February 2011, the date of the notice. DW1 reiterated that there were many letters and documents that would show that the plaintiffs occupation of the land was as of a monthly tenancy. The documents are:

(a) the plaintiffs letter dated 29 September 2010 to the defendant stating that it would continue to pay monthly rental of RM2000 for Parcel E (p 335 of CB);

(b) the defendant's letter dated 15 June 2009 to the plaintiff requiring the plaintiff to pay 'sewa pajakan tanah' of RM4,000 for Parcel E for the period from 25 April 2009 to 24 June 2009 (pp 339–340 of CB); and

(c) the defendant's letter dated 18 November 2009 to the plaintiff informing that pursuant to the decision that was reached at the meeting that was held on 30 August 2001, the plaintiff was required to pay 'sewa pajakan tanah' of RM2,000 for Parcel E for the period from 25 November 2009 to 24 December 2009 (p 342).

**[42]** After the Cabinet decision, the defendant had filed a claim of RM204m from the Government as the current market value of the land. DW1 tendered D1 which is a calculation made by Diana bt Abdul Latif, a valuation officer attached to Jabatan Penilaian dan Pengurusan Harta. D1 has been verified and approved by Puan Kamariah bt Ibrahim, the pengarah penilaian. Based on D1, the figure of RM204,406,658.78 was arrived at based on an acreage of 62.568 acres and a price of RM75 per sq ft. However, DW1 admitted that the land was not acquired under the Land Acquisition Act 1960. He agreed that when the land was alienated by the Government in 1993, its value was only RM4.2m.

He further agreed that the defendant had not paid anything more to the Government other than the RM 4.2m that was paid by the plaintiff.

**[43]** In respect of the plaintiffs claim of legitimate expectations, it is DW1's evidence that this is but an afterthought.

**[44]** Ainan Masni bt Abdullah Sani ('DW2') is an assistant legal officer in the Legal Department of DBKL's Jabatan Hal Ehwal Undang-Undang. She commenced employment with DBKL on 21 October 1996 and was involved in the vetting of the draft agreement in respect of Lot No 52314. According to DW2, whilst there was a written agreement between the parties in respect of Lot No 50642 (pp 5–31), there was no written agreement between the parties in respect of Lot No 52314. She identified the documents at pp 113–194 as a number of draft agreements between the parties. According to her, the plaintiff had not implemented all the terms of the draft agreement. Examples of terms not implemented were the clause on arbitration and the minimum guarantee profit clause.

**[45]** DW2 was referred to the provision on minimum guaranteed profit at p 156. She testified that to the best of her knowledge, the plaintiff had never paid the minimum guaranteed profit to the defendant and that this would show that the plaintiffs application to the court to enforce the draft agreement was nothing but an afterthought.

**[46]** It is DW2's evidence that the plaintiffs application for specific performance of the fourth draft agreement is not possible as the terms of the draft agreement had yet to be finalised. As such, the terms of an unfinalised draft agreement would not bind the parties. And as to why the draft agreement was not yet finalised, it is her evidence that the parties were still in the process of bargaining with each other on the duties and obligations of the affected parties. However, she disagreed that the draft agreement was not finalised because the type of development on the subject lot had yet to be finalised.

**[47]** DW2 did not agree with the suggestion that notwithstanding the fact that there was no written agreement between the parties in respect of the subject lot, there existed an agreement between the parties for a 70 year lease of the property commencing from 1993 based on the payment of the premium, quit rent and annual rental of RM24,000. When referred to para 2.1.3 (p 213) of the minutes of 26 August 2008, he agreed that his evidence that there was no lease of Lot No 52314 was contradictory to the contents of that paragraph.

**[48]** Mohd Attamimi bin Farouk @ Maarof ('DW3') is the third and final witness called by the defendant. He is employed as a *pegawai tadbir* in the Bahagian Penswastaan of Jabatan Perancang Ekonomi dan Penyelarasan

Pembangunan Dewan Bandaraya Kuala Lumpur. He identified the minutes of meeting held on 10 April 2008 (pp 264–272), which meeting he had attended. He confirmed that at the said meeting, the representative from the Jabatan Ketua Pengarah Tanah dan Galian had given a briefing about the implementation of the TABB project. At the meeting, the representative of the defendant had admitted that the premium for Lot No 52314 had been paid by the plaintiff but that a 'Perjanjian Penyewaan' for the lot had yet to be signed.

**[49]** In his evidence, DW3 referred to the following documents:

(a) the defendant's letter at pp 333–334 of CB1 where at para 3, the defendant had noted that the plaintiff had built on and occupied the property for 18 years from 1993 until 2010 and that its occupation was 'berpadanan dengan pembayaran jumlah premium dan sewaan tersebut';

(b) the defendant's letter to the plaintiff dated 28 November 2007 (p1 of CB3) where the defendant stated that the 'tapak Padang Polo bagi Parcel E' was not part of the 1989 agreement. However, it is noted that following the meeting held on 30 August 2001, a decision was made that the 'kadar sewa tahunan' for Parcel E would be 'RM2,000 sebutan selepas TCF atau CF mana yang dulu dikeluarkan';

(c) the defendant's letter to the plaintiff dated 24 January 2008 reminding that it had yet to receive the draft *perjanjian penyewaan* for the polo field (Parcel E); and

(d) the defendant's letter to the plaintiff dated 16 April 2008 again reminding that it had yet to receive the draft *perjanjian penyewaan* for the polo field (Parcel E).

**[50]** During cross-examination, DW3 was questioned as regards the minutes of the meeting held on 26 August 2008. He agreed that para 2.1.3 of the minutes states that the defendant had approved a 70 year lease for Lot No 52314 commencing from 1993 but he disagreed with the contents of the said paragraph. He admitted that the defendant had not, at any time after receipt of the minutes of meeting, written back to the relevant parties to place on record that the statement in para 2.1.3 was incorrect.

**[51]** DW3 confirmed that to date, the privatisation agreement in respect of the privatisation project referred to in para 2.1.7 had yet to be signed between the relevant parties because the type of development had not yet been finalised. He agreed that the parties had agreed that there was going to be an agreement. He further agreed that at the time, the proposal was for a privatisation agreement for 70 years. He agreed that whilst the discussions on the privatisation agreement were on going, there was no tenancy agreement in respect of Parcel E. The proposal for a tenancy agreement was at the defendant's

initiative because the privatisation agreement had not been finalised after such a long delay.

EVALUATION AND FINDINGS

**[52]** From the onset the court was informed that the plaintiff was abandoning prayers (i) and (ii) of para 33 of the statement of claim in relation to ownership of Lot No 52314 and that they would be going just on the specific performance of the lease. The concession was made because of the minutes of the meeting held on 26 August 2008 where at para 2.1.7 the plaintiff had agreed that Lot No 52314 'adalah milik DBKL'.

**[53]** Although the subject land in this case is Lot No 52314, however it is necessary to start with the lease of Lot No 50642. It is not in dispute that the parties had entered into an agreement dated 25 March 1989 for the lease of Lot No 50642 for a term of 70 years for the purpose of developing and operating the Bukit Kiara Club. The court notes that since the land authority had only alienated Lot No 50642 to the defendant on 27 March 1998, the 1989 agreement was entered into way before the document of title was issued to the defendant. And this is a fact which would be known to both parties.

**[54]** It is very pertinent to note that the document of title for Lot No 50642 states that the land is to be used for equestrian and recreational purposes only and that any development to be carried out thereon was to be in accordance with the defendant's development order. It is thus with that background in mind that we move on to the position as regards Lot No 52314.

**[55]** It goes without saying that to carry on an equestrian club requires, first and foremost, land. From an early stage, the plaintiff, realising that it needed additional land, had held negotiations with the defendant for additional land to be developed into a polo field and a grandstand. It is the plaintiffs case that it had an agreement with the defendant for the latter to apply for additional land adjoining Lot No 50642 to complement its development on Lot No 50642. The court has no difficulty in accepting that this agreement between the parties exists as evidenced by the fact that the defendant did indeed apply for the additional land and the land office in Wilayah Persekutuan had approved the application for 62.57 acres of state land as additional land to Lot No 50642. The very caption to the land office's letter dated 6 December 1993 clearly denotes that the application was for additional land for the 'Tapak Pembangunan Pusat Menunggang Kuda dan Rekreasi' as well as for the polo field. It was, in fact, a condition of the alienation that the land was to be used for the *Pusat Menunggang Kuda dan Rekreasi* and the polo field.

**[56]** The court finds that the relationship between the parties goes far

beyond a mere discussion that the defendant is to apply for the alienation of the subject lot as additional land to complement the Equestrian Club. It is an undisputed fact that when the land office requested the defendant for the payment of the premium, quit rent, survey fees, and other fees for the preparation of the title etc, the defendant had requested the plaintiff to pay the amount. A sum of RM4,221,154.99 was paid as evidenced by the defendant's official receipt.

**[57]** Whilst it is true that it was not explicitly stated in the letter that the defendant would lease the land to the plaintiff for a period of 70 years in consideration for the premium to be paid, however the court has considered whether from the actions of the parties, the court is able to conclude that there was an oral agreement or understanding between the parties to that effect.

**[58]** The court must state from the outset that the defendant's very voluminous submissions of 113 pages contains many issues which were either not pleaded or which were not part of the agreed issued to be tried agreed between the parties and filed in court. On the authority of *Yew Wan Leong v Lai Kok Chye* [1990] 2 MLJ 152 where the Federal Court had allowed an appeal on the grounds that the High Court had made a decision on an issue which was not raised by the parties in their pleadings, the court does not intend to consider unpleaded issues. A word on voluminous submissions. Apart from being extremely difficult to digest, the voluminous nature of submissions would detract from and dilute the court's attention from the more pertinent, important and salient features of a party's case. There is much to be said for having short and concise submissions which goes straight to the root of the issues to be determined by the court.

**[59]** It is the plaintiffs case that there was a concluded oral agreement between the parties for the lease of Lot No 52314 for 70 years commencing from 1994. On the other hand, it is the defendant's case that there was no concluded agreement for the lease of the said property for 70 years. The plaintiff is not alleging that there was a written agreement but that there was an oral contract.

**[60]** The court has carefully considered the defendant's submissions on its claim that there was no oral agreement. The defendant argues that there is no oral agreement because there is no evidence as to the specific persons who had entered into the oral agreement, the date and place of the oral agreement, or the terms of the oral agreement. It is the defendant's case that there were only negotiations towards the execution of a lease agreement and that the draft agreement was prepared by the plaintiff. It contends that it was the plaintiff which had made the offer but that there was no proof that the defendant had accepted it. As such, the defendant submits that the draft agreement was only

unilateral as the plaintiff had failed to proof that the defendant had indicated that they were in agreement with the draft agreement.

**[61]** Whilst it is true that information about the persons who entered into the oral agreement, the date, time, and place of the oral agreement are important, the existence or otherwise of an oral agreement can also be gleaned from other facts and not necessarily from such information alone. The court has thus looked wider at the actions and reactions of the parties to decipher if they are more consistent with there being an oral agreement between the parties.

**[62]** The defendant has also submitted that the plaintiff has failed to prove the fundamental terms of the alleged oral agreement namely that the lease was to be for a period of 70 years. Learned counsel pointed out that cl 7.1(i) at p 115 of CB1 merely states that 'the Datuk Bandar agrees to lease and the Lessee agrees to take on the lease for the period of the Lease' without mentioning the period of the lease. Further, it was pointed out that p 165 of CB1 in respect of the fourth draft and p 134 in respect of the fifth draft defines 'Term' to mean the period of lease for sixty five years commencing from 24 March 1994. It is also the defendant's submission that it is impossible for the court to declare that there is an oral lease based on the draft agreements because there is uncertainty as to which of the draft agreements to base the oral agreement upon.

**[63]** Other points raised by learned counsel for the defendant in his submissions include the argument that the lease agreement, whether written or oral, was void for uncertainty.

**[64]** In the face of these arguments of the defendant against the existence of lease agreement, the court cannot help but note the earlier history of the dealings between the parties in respect of Lot No 50642. In that case, a lease agreement was entered into between the parties on 25 March 1989 before the alienation of Lot No 50642 to the defendant on 27 March 1998. Lot No 50642 was alienated to the defendant to be used as the site for an Equestrian and Recreational Centre. In light of the court's earlier findings that Lot No 52314 was applied for by the defendant following discussions between the parties and for its use as additional land for the Equestrian Club, the reason as to why the plaintiff, at the request of the defendant, had paid the premium, quit rent, survey fees and fees for the preparation of title amounting to some RM4,221,154.99 becomes clear.

**[65]** The court finds that the actions of the parties both prior and after the alienation of Lot No 52314 are more consistent with there being an oral agreement or understanding between the parties that the subject lot was to be leased to the plaintiff as additional land for the running of the Bukit Kiara

Equestrian and Country Resort Bhd, the former name of the plaintiff than otherwise. The court finds it unlikely that the plaintiff would have paid out the sum of RM4,221,154.99 as premium and other connected expenses for the land if there was no such oral agreement. The court notes that RM4,221,154.99 was no small sum.

**[66]** The court notes that the defendant in its pleadings had in fact admitted to the plaintiff being a lessee. In para 20 of the statement of claim, the plaintiff had pleaded, inter alia, that it had been paying the lease rental for Parcel E. In para 11 of its amended defence, the defendant had admitted para 20 of the statement of claim as well as averring that 'such payments are the plaintiffs responsibilities as a lessee to the land'.

**[67]** The court is in agreement with learned counsel for the plaintiff that the above pleading in the defence is binding on the defendant and would amount to a judicial admission that the plaintiff is a lessee and can be made the foundation of rights *Salleh bin Kilong, (deceased) v Superintendent of Lands and Surveys, Miri Division & Anor* [2005] 3 MLJ 305; *Hu Chang Pee v Tan Sri Datuk Paduka (Dr) Ting Pek Khiing* [1999] 3 MLJ 402.

**[68]** The court further finds that the existence of an oral agreement to lease the subject land would also be consistent with the minutes of the meeting held on 26 August 2008 where the meeting took note that the defendant had approved the lease of Lot No 52314 to the plaintiff for 70 years commencing in 1993 although to date no lease agreement had been signed between the parties. From the evidence adduced, the said minutes of meeting were circulated to and received by the defendant. However, no attempt was ever made by the defendant to correct the minutes if it was inaccurate. In light of these facts and following the decision in the case of *David Wong Hon Leong v Noorazman bin Adnan* [1995] 3 MLJ 283; [1995] 4 CLJ 155, the court finds that the failure by the defendant to correct the minutes of the meeting would point to the contents of such minutes being true and accurate.

**[69]** The court is aware that the defendant, in its submissions, has sought to argue that the maker of the minutes was not before the court and that in his absence, the minutes cannot be taken as showing that the defendant had agreed to a lease agreement. On this issue, the court notes that the parties had agreed that the said minutes be placed in Part B of the common bundle. As such, the maker of the document need not be called to court as a witness. The court thus finds that in the absence of any evidence that the 26 August 2008 minutes were amended or corrected following its circulation or even at the next meeting, the court has no hesitation in accepting the minutes as accurately reflecting what had occurred during the meeting.

**[70]** The defendant has raised the issue of frustration of the lease agreement as a result of the Cabinet decision on the TABB project. In this regard, the court is totally in agreement with the plaintiff. Reference is made to art 13 of the Federal Constitution and the case of *S Kulaisingam & Anor v Commissioner of Lands, Federal Territory & Ors* [1982] 1 MLJ 204 where Hashim Yeop Sani J (as His Lordship then was) held that art 13(1):

> guarantees the rights of any person not to be deprived of his property save in accordance with law which simply means that no one can be deprived of his property merely on the orders of the executive but that he may be deprived of his property only in accordance with law.

Whilst the Cabinet may have decided on the TABB project, however, to date there has been no gazette notification of any land acquisition for Lot No 52314. It may well be that the Cabinet, after learning that the defendant had an oral agreement with the plaintiff for the lease of the said land and that the plaintiff had acted on the oral agreement by developing the property, may well decide that the TABB project could, much more easily and fairly, be located at some different site.

**[71]** In light of the court's finding that there is an oral agreement between the parties for the lease of Lot No 52314 and in the absence of any proper acquisition notice under the Land Acquisition Act 1960 coupled with evidence adduced that the defendant had sought RM203m as compensation from the Government for the acquisition of the subject lot, the court finds that the defendant's notice dated 25 March 2011 to be improper, unfair, unjust and premature.

## CONCLUSION AND REMEDY

**[72]** In conclusion, the court finds, on a balance of probability, that the issue of whether there was an oral agreement between the parties for a lease is to be answered in the affirmative. There was an oral agreement for a lease or else the defendant would not have required the plaintiff to pay the premium, quit rent and other dues and charges, allowed the plaintiff to be in occupation or approve the plaintiffs plans to develop a polo field, grandstand, st ables and other amenities on the said lot. Neither would the plaintiff have agreed to pay the premium on the property if there was no prior agreement or understanding. The court finds that *the defendant had allowed the plaintiff to act on the purported oral lease* by expending considerable sums of monies to develop the property.

**[73]** Having found that there was an oral agreement between the parties that Lot No 52314 was to be leased to the plaintiff, there is next the issue of the terms of the lease. Can the court accept, as suggested by learned counsel for the

plaintiff, that the oral agreement is for a lease of 70 years commencing from 1994 upon the consideration of:

(a) the premium sum of RM4,221,154.99 and the quit rent which had already been paid;

(b) the plaintiff continuing to pay the quit rent and assessment for Lot No 52314;

(c) RM2,000 lease rental per month for Parcel E;

and that the court should 'mould' the relief sought on those lines? In this context, the court has considered the Court of Appeal decision in the case of *Sinar Wang Sdn Bhd v Ng Kee Seng* [2005] 2 MLJ 42 which gave the nod to moulded relief. In that case, His Lordship Gopal Sri Ram JCA held as follows:

> The whole approach of equity to problems coming within its parameters is one of flexibility based on broad and general doctrines rather than strict and unyielding rules. This is the hallmark of equity and it is in this fundamental respect that equity differs and diverges from common law. Equitable doctrines and remedies are therefore flexible and adaptable to particular circumstances. The court of equity may therefore mould the relief that is to be granted on particular facts.

**[74]** Whilst finding that there was an oral agreement between the parties for a lease of Lot No 52314, the court is concerned that the consideration suggested by the plaintiff in support of its plea for the moulded relief may not be quite sufficient to set out the rights and obligations of the parties and avoid future conflict and dissent. The court has thus sought enlightenment from the terms of the 1989 agreement in respect of Lot No 50642.

**[75]** The court can accept that the period of the lease is 70 years commencing from 1994, the consideration of the lease is the premium of RM4,221,154.99, the quit rent of RM313,891, the lease rental already paid and the agreement of the plaintiff to continue paying the quit rent and agreed rental of RM2,000 per month for Parcel E. The court finds the above consideration to be not inconsistent with the lease rental of RM174,451 for the first five years ('the Initial Term') in respect of Lot No 50642. In the 1989 agreement, there was a provision that after the initial term, the parties would mutually agree to review the lease rental, whether by increasing the lease rental or by settling the balance rental in full. Such a provision, amongst others, would be equally beneficial and just for the lease agreement in this case.

**[76]** The court has spent considerable time considering whether it should make an order in terms of the 'moulded' relief sought by the plaintiff or alternatively to order the parties to enter into a lease agreement along the lines of the 1989 agreement for Lot No 50642. The court had feared that in light of the present difficulties between the parties, the dispute between them may not

end with such an order. After due consideration, the court is of the view that a written lease agreement with specific provisions detailing the rights and obligations of both parties is infinitely better for both parties than the pure 'moulded' relief order sought by the plaintiff. The court is of the view that with this approach, there would be more certainty which can only be of advantage for parties in a contractual relationship.

**[77]** Accordingly, the court hereby orders the parties, within 30 days or such longer period as is mutually agreed between them, to enter into a formal and written lease agreement incorporating both the moulded relief as well as other relevant provisions of the 1989 agreement in respect of Lot No 50642 as is agreeable between the parties. It is hoped that neither party would be unduly difficult or drag its feet in bringing this to pass as the court cannot overly emphasise the benefits of such a written lease agreement to both parties.

**[78]** The court further orders costs is to be paid by the defendant to the plaintiff, which costs are to be taxed unless otherwise agreed between the parties.

*Claim granted with costs and parties ordered to enter into a formal and written lease agreement for Lot 52314*

Reported by Ashok Kumar